

This Opinion is Not a
Precedent of the TTAB

Mailed: June 15, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re International Fruit Genetics, LLC

Serial No. 88711163

Kimberlee A. Boyle and Molly Buck Richard of Richard Law Group, Inc.,
for International Fruit Genetics, LLC.

Beniam Biftu, Trademark Examining Attorney, Law Office 117,
Cynthia Tripi, Managing Attorney.

Before Lykos, Lynch, and Coggins,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background and Preliminary Matters

International Fruit Genetics, LLC (“Applicant”) seeks registration on the Principal Register of the mark KOKOMO in standard characters for goods in three International Classes, including the following in Class 31, the only class of goods still at issue in this case:

Fresh fruits and vegetables; live plants, namely, live table grape vines; live plant material, namely, live table grape vine plant material; all of the foregoing excluding tomatoes and field corn, rye grass and perennial rye grass in International Class 31.¹

The Examining Attorney partially refused registration as to the Class 31 goods under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the previously registered standard-character mark KOKOMO for “wine” in International Class 33.²

Both Applicant and the Examining Attorney have noted in their Briefs³ that the Section 2(d) refusal applied to Applicant’s Class 31 goods first issued in what the Examining Attorney designated a “final” Office Action, which also maintained a previously-issued Section 2(d) refusal as to Classes 32 and 33. Because this was the first time likelihood of confusion was raised as to the goods in Class 31, a “final” action was premature as to that class at the time of the November 22, 2021 Office Action. *See* 37 C.F.R. § 2.63(a) & (b).

Applicant submitted a request for reconsideration on April 22, 2022, that included arguments and evidence addressing not only the properly made final refusal as to

¹ Application Serial No. 88711163 was filed on December 1, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s alleged bona fide intent to use the mark in commerce. The goods in International Classes 29 and 30 are not the subject of a refusal to register. Applicant previously deleted goods in Classes 32 and 33 from the application. 6 TTABVUE.

² Registration No. 3115343 issued on July 11, 2006 on the Principal Register, and has been renewed. Other requirements and refusals, including based on Section 2(d) as to other registrations, have been withdrawn.

³ 10 TTABVUE 6 (Applicant’s Brief); 12 TTABVUE 12 n.4 (Examining Attorney’s Brief).

Classes 32 and 33, but also the refusal raised for the first time as to Class 31.⁴ In a July 4, 2022 Office Action, the Examining Attorney denied reconsideration and maintained the refusal of registration as to all three of those classes, including as to Class 31. Because this Office Action involved consideration of Applicant's arguments and evidence as to the Class 31 refusal, and reflected a reexamination of the application by the Examining Attorney, who maintained the refusal as to Class 31, we construe it as a "final" action for the goods in that class, and not a request for reconsideration. *See* 15 U.S.C. §§ 1062(b)(2) & 1070; 37 C.F.R. § 2.63.

Applicant had submitted a Notice of Appeal on May 19, 2022, and the appeal resumed on July 5, 2022, following the Examining Attorney's denial of reconsideration. Prior to briefing, Applicant filed a request for remand to amend the application to delete Classes 32 and 33, which, Applicant believed, "coupled with the already-made limitation and clarification the Examining Attorney accepted from Applicant in Class 31, satisfactorily addresses the Examining Attorney's concerns."⁵ In a September 6, 2022 Order, the Board noted that "Applicant seeks remand so that the Trademark Examining Attorney may consider a proposed amendment," granted Applicant's request, and remanded the case, noting that "[i]n the event the refusal of registration is maintained, the file should be returned" to the Board.⁶

⁴ April 22, 2022 Request for Reconsideration at TSDR 2-3, 5, 8.

⁵ 6 TTABVUE 3. With the deletion of Classes 32 and 33, only Class 31 would remain subject to refusal. As noted above, Classes 29 and 30 also remain in the application, but are not subject to refusal.

⁶ 7 TTABVUE.

In an October 16, 2022 Office Action, in accordance with the Board’s remand Order, the Examining Attorney accepted the amendment deleting Classes 32 and 33 and therefore withdrew the then-mooted refusal of registration as to those classes; but, as to Class 31, the Examining Attorney “maintained and continued” the Section 2(d) refusal. However, in a departure from the scope of the remand specified in the Board’s Order, the Examining Attorney introduced new evidence in support of the refusal as to Class 31.⁷

As the Board explained in *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1135-36 (TTAB 2015), a remand for a specific purpose (here, Applicant’s proposed amendment deleting Classes 32 and 33) does not open the door to supplementing the evidentiary record on a different issue (here, the Section 2(d) refusal as to Class 31).⁸ TRADEMARK BOARD MANUAL OF PROCEDURE § 1209.04 (2023) (“TBMP”) (notes omitted), regarding remands requested by applicants, states, in relevant part:

The examining attorney may only consider the matter for which the application has been remanded. The examining attorney may not use the remand in order to submit evidence in connection with a refusal or requirement that is not the subject of the remand request. To submit such evidence, reinstate a refusal or requirement, or make a new refusal or requirement, the examining attorney would have to file [a] separate request for remand.

⁷ October 16, 2022 Office Action at TSDR 3-21. The Examining Attorney did not indicate that the new evidence related to the amendment, and instead indicated that the new evidence involves “fruits and vegetables,” and “wines,” while the earlier evidence involved “various types of grapes and wines.” *Id.* at TSDR 4.

⁸ We note that because of the Board’s instruction in its remand Order that the case return to the Board after the Examining Attorney took action on the amendment, Applicant had no opportunity to respond to the new evidence.

Thus, if the Examining Attorney “wished to submit additional evidence regarding the Section 2(d) refusal” as to Class 31, then “the Examining Attorney should have filed with the Board [his] own request for remand for the purpose of submitting additional evidence.” *Hughes Furniture*, 114 USPQ2d at 1136 (citing 37 C.F.R. § 2.142(d) and *In re Juleigh Jeans Sportswear Inc.*, 24 USPQ2d 1694, 1696 (TTAB 1992)). Accordingly, we decline to consider the new evidence submitted on remand attached to the October 16, 2022 Office Action maintaining the final refusal.

Applicant and the Examining Attorney both filed briefs. Applicant attached new Internet evidence to its Brief, consisting of screenshots, captured the day its Brief was filed, from websites relied on by the Examining Attorney during prosecution. New evidence on appeal is untimely under Trademark Rule 2.142(b), 37 C.F.R. § 2.142(b), and we do not consider it.⁹ To the extent, if any, the screenshots reflect the same content as website evidence already in the record, the new screenshots are duplicative and unnecessary. *See In re Thor Tech Inc.*, 85 USPQ2d 1474, 1475 n.3 (TTAB 2007) (attaching evidence from record to briefs is duplicative and unnecessary); *see also In re SL&E Training Stable Inc.*, 88 USPQ2d 1216, 1220 n.9 (TTAB 2008) (attaching as exhibits to brief material already of record requires Board to determine whether attachments had been properly made of record and adds to the bulk of the file).

⁹ *See In re I-Coat Co.*, 126 USPQ2d 1730, 1734 n.15 (TTAB 2018) (“The proper procedure for an applicant ... to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination.”); TBMP § 1209.04 (good cause required for remand to submit new evidence).

II. Likelihood of Confusion

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, **3 (Fed. Cir. 2020) (“Not all *DuPont* factors are relevant in each case”). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

A. Similarity of the Marks

Under the first *DuPont* factor, we compare the marks “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d at 1746 (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB

2014)). The marks are identical in all aspects, and the first *DuPont* factor therefore weighs heavily in favor of a likelihood of confusion.

B. Similarity of the Goods

In analyzing the relatedness of the goods under the second *DuPont* factor, we look to the identifications in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). It is sufficient for a finding of likelihood of confusion as to a class of goods if relatedness is established for any one of the recited goods within the class. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 123 USPQ2d 1744 (Fed. Cir. 2017).

Where, as here, the marks at issue are identical, the degree of similarity between the goods required for confusion to be likely declines. *See, e.g., Orange Bang, Inc. v. Ole Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015); *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) (“Where the applicant’s mark is identical to the registrant’s mark, as it is in this case, there need only be a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists”).

Registrant’s goods are wine, and Applicant’s goods include “fresh fruits and vegetables ... excluding tomatoes and field corn, rye grass and perennial rye grass.”

Applicant's identification must be construed to encompass all types of fresh fruits and vegetables, other than tomatoes and field corn, including fruits used in the production of wine such as grapes and berries. *See, e.g., In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) ("Registrant's goods are broadly identified as computer programs recorded on magnetic disks, without any limitation as to the kind of programs or the field of use. Therefore, we must assume that registrant's services encompass all such computer programs including those which are for data integration and transfer."); *cf. In re Hughes Furniture Indus., Inc.*, 114 USPQ2d at 1137 ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

The Examining Attorney introduced two types of relatedness proof – marketplace evidence and third-party registrations. The marketplace evidence reflects consumer exposure to wine and fresh fruits or vegetables emanating from the same source under the same mark. For example:

The DEOL Family Estate Winery promotes its "grapes" and "wines" under its mark.¹⁰

The Fulkerson Farms and Fulkerson Winery offers under its FULKERSON mark various wines as well as various fresh fruits and vegetables including apples, grapes, asparagus, peaches and cherries.¹¹

The Red Fox Winery & Vineyards offers under its mark "Grapes" as well as "Wine."¹²

¹⁰ July 4, 2022 Denial of Reconsideration at TSDR 34-35 (deolesatewinery.com).

¹¹ July 4, 2022 Denial of Reconsideration at TSDR 36-37 (fulkersonwinery.com).

¹² July 4, 2022 Denial of Reconsideration at TSDR 38-39 (redfoxwinery.com).

Rocky Pond Estate Winery promotes under its mark “hand-picked premium grapes” available for purchase and various wines bearing its mark.¹³

Scheid Family Wines promotes under that mark its grapes and its custom wines and bulk wines.¹⁴

Still Waters Vineyards offers grapes (“Purchase Grapes 2022”) and a variety of wines under its mark.¹⁵

The Heringer Estates Family Vineyards & Winery promotes its “Grapes and Bulk Wine.”¹⁶

This evidence supports the relatedness of the goods in the application and cited registration by showing that consumers are accustomed to encountering them offered by a single source under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

The Examining Attorney also submitted a few use-based third-party registrations that cover both wine and fruits or vegetables under the same mark.¹⁷ The registration

¹³ July 4, 2022 Denial of Reconsideration at TSDR 40-41 (rockypondwinery.com).

¹⁴ July 4, 2022 Denial of Reconsideration at TSDR 42-43 (scheidwinery.com).

¹⁵ July 4, 2022 Denial of Reconsideration at TSDR 44-45 (stillwatersvineyards.com).

¹⁶ November 22, 2021 Office Action at TSDR 19-21 (heringerestates.com).

¹⁷ Although the Examining Attorney’s Brief also points to registrations that include wine as well as the service of cultivating grapes for others, we have limited our consideration to the third-party registrations that list wine, such as in the cited registration, and fruits or vegetables, such as Applicant identifies in the subject application.

for KLIPSUN VINEYARDS lists “fresh grapes; fresh grapes for making wine” and “wine.”¹⁸ The MILBRANDT VINEYARDS registration includes “fresh grapes; fresh grapes for winemaking” and “wine.”¹⁹ The registration for REDDY VINEYARDS identifies goods including “fresh grapes; fresh wine grapes” and “wine.”²⁰ “As a general proposition, although use-based, third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have some probative value to the extent they may serve to suggest that the goods are of a kind that emanate from a single source.” *I-Coat Co.*, 126 USPQ2d at 1738 (citations omitted); *see also In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d* (unpublished), No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988). These registrations corroborate the marketplace evidence.

Also, the “wine” in the cited registration is “[a] beverage made of the fermented juice of any of various kinds of grapes, usually containing from 10 to 15 percent alcohol by volume,” and “[a] beverage made of the fermented juice of any of various other fruits or plants.”²¹ Thus, Registrant’s goods are made from “fresh fruit” such as

¹⁸ November 22, 2021 Office Action at TSDR 7-9.

¹⁹ November 22, 2021 Office Action at TSDR 13-15.

²⁰ November 22, 2021 Office Action at TSDR 16-18.

²¹ We take judicial notice of these definitions of “wine” from the American Heritage online dictionary, accessed June 12, 2023. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). Although the Examining Attorney twice mentioned this definition during prosecution, it was not attached to either Office Action. *See* November 22, 2021 Office Action at TSDR 1; July 4, 2022 Office Action at TSDR 1.

Applicant has identified, making them commercially related. *See, e.g., In re Crompton Co.*, 221 USPQ 471 (TTAB 1983) (“goods involved herein are so related that refusal of registration is compelled” where consumers “likely to ascribe a common origin to fabric and finished clothing items made from such fabric when sold under the same or similar marks”); *In re Akzona Inc.*, 219 USPQ 94, 95 (TTAB 1983) (goods deemed related where synthetic yarns used to make finished clothing); *see also In re Pan-O-Gold Baking Co.*, 20 USPQ2d 1761, 1765 (TTAB 1991) (muffin mix and freshly baked bread and rolls considered related goods).

In its arguments under this *DuPont* factor, Applicant focuses heavily on its identification of “table grapes,” distinguishing them from “wine grapes,” and contending that “[t]he cited registrant would not use Applicant’s table grapes to make its wine.”²² In a similarly flawed argument, Applicant criticizes the Examining Attorney’s marketplace evidence, described above, because Applicant contends “the vineyards are *selling wine grapes and wine*, [and] they are doing so *in bulk, to winemakers*.”²³ However, these arguments overlook that the application lists “fresh fruit,” and because we must “give full sweep” to Applicant’s identification, we cannot limit it to any particular type of fruit, much less any specific type of grapes. *Paula Payne Prods. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“likelihood of confusion must be decided on the basis of the respective descriptions of goods” and Board must give identifications their “full sweep”); *see also Stone Lion*

²² 10 TTABVUE 11 (Applicant’s Brief).

²³ 10 TTABVUE 12 (Applicant’s Brief).

Cap. Partners, 110 USPQ2d at 1161; *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”).

Thus, the second *DuPont* factor weighs in favor of likely confusion.

C. The Trade Channels, Classes of Consumers and Degree of Care in Purchasing

Turning to the trade channels, the third-party website evidence discussed above establishes that goods such as Applicant’s fresh fruits and Registrant’s wine travel in some of the same channels of trade to the same classes of consumers. The record reflects that vineyards and wineries sell their wines, as well as fruits, at the same establishments, to some of the same consumers.

Applicant again makes arguments that rely on alleged realities of the marketplace that are not reflected in the identifications of goods. For example, we must disregard Applicant’s claims that it “does not operate a vineyard or winery” and that its products “are *not sold* to the end consumer.”²⁴ We cannot read such limitations into the unrestricted identifications by resorting to extrinsic evidence, and instead, we must rely on the identifications alone. *See Detroit Ath. Co.*, 128 USPQ2d at 1053 (noting the impermissibility of an applicant’s attempt to restrict the breadth of the

²⁴ 10 TTABVUE 14 (Applicant’s Brief) (emphasis in original).

goods or trade channels described in the cited registration). Because Applicant's recitation of "fresh fruits and vegetables" contains no restrictions on trade channels or classes of consumers, we must presume that these fresh fruits and vegetables travel in all ordinary channels of trade for such goods, to all the usual classes of consumers, and the record shows that those trade channels and consumers overlap with those for wine. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"). Thus, the third *DuPont* factor weighs in favor of likely confusion.

In an argument potentially addressing the degree of care in purchasing under the fourth *DuPont* factor, Applicant points to "winemakers" as the only relevant consumer,²⁵ but we disagree, as the identifications neither contain nor even suggest such a limitation. To the extent that the marketplace evidence involves wine grapes, there is nothing to preclude smaller-scale winemakers or even individuals from purchasing them. "Board precedent requires the decision to be based 'on the least sophisticated potential purchasers.'" *See Stone Lion Cap. Partners*, 110 USPQ2d at 1163 (citation omitted). The fourth *DuPont* factor is neutral.

²⁵ 10 TTABVUE 12-13 (Applicant's Brief).

D. Conclusion

Weighing the *DuPont* factors for which there has been evidence and argument in this appeal, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023), the identical marks for related goods that move in some of the same channels of trade to some of the same classes of customers, who exercise an ordinary degree of care in purchasing, renders confusion likely as to Applicant's goods in International Class 31.

Decision: The refusal under Trademark Act Section 2(d) to register Applicant's mark for the goods in International Class 31 only is affirmed. In due course, the goods in International Class 31 will be deleted, and the application will proceed with the remaining goods in International Classes 29 and 30.